Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1474

ROY W. HUNT,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to United States Court of Appeals
for the Ninth Circuit

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Roy W. Hunt, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Ninth Circuit, entered in the case of United States of America vs. Roy W. Hunt on January 30, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is printed

in the Appendix hereto, *infra,* page i. The judgment of the United States District Court, for the Northern District of California, is printed in the Appendix hereto, *infra,* page iv.

JURISDICTION

The judgment of the United States Court of Appeals, Ninth Circuit, was entered on January 30, 1978. A timely petition for rehearing was denied on March 17, 1978 (Appendix, *infra,* page vii). The jurisdiction of the Supreme Court is invoked under U.S. Constitution, Article III, Sec. 2, Clause 2; 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether it constitutes abuse of discretion on the part of a federal trial court to exclude testimony of a percipient witness where, in a criminal prosecution for willful failure to file income tax returns, the defendant claims a defense based on mental capacity or condition and said witness, who is a trained psychiatrist, is offered for his testimony relating to defendant's behavior, mental state and emotional condition having observed the same at the time of commission of the offenses charged.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner was convicted following a jury trial of three counts of willfully failing to file federal income tax returns for the tax years 1970, 1971 and 1972, in violation of 26 U.S.C. §7203. Prior to trial, petitioner had given notice of his intention to rely on a mental defense pursuant to Federal Rules of Criminal Procedure, Rule 12.2. Petitioner's defense was that he did not have mental capacity, by virtue of the mental condition, to form the requisite intent, or *mens rea,* to commit these crimes.

Prior to trial, two witnesses were offered by the defense on the question of his mental condition. Both were qualified psychiatrists who had examined the defendant: The first witness has been a life-long acquaintance of the defendant and had previously had him in therapy for treatment of this mental condition over a period of eighteen months, following defendant's previous conviction of this same offense in 1961. The other defense witness had recently examined the

defendant following the filing of the information charging him, again, with this offense, and generally concurred with the diagnosis of the treating psychiatrist (first witness).

By stipulation between defense counsel and the Government, a third expert psychiatric witness was appointed to examine the defendant. His opinion was basically the same as the other two psychiatrists, but he concluded that the defendant's mental condition was not as severe as stated by the other two experts. Nevertheless, he found in his opinion the defendant could not have willfully failed to file the return because of a mental infirmity.

Prior to trial, an *in limine* hearing was held outside the presence of the jury at which all three psychiatrists testified. (This was actually done in two stages, the first defense expert—treating psychiatrist —testifying on the first day, and the two remaining psychiatrists testifying some weeks later at the continued hearing. Following testimony of the first psychiatrist, and before the next hearing a trial brief was filed by the defense offering his testimony as that of a percipient witness, as well as, or in lieu of, his testimony as an expert). Following the *in limine* hearing, the trial court ruled to exclude the testimony of the expert witnesses on grounds that their testimony would be misleading and confusing to the jury. The trial court further expressly ruled that the treating psychiatrist could not testify as a percipient witness for the same reasons, even though this witness had testified to being present in the defendant's office and

having business dealings with the defendant at the times of the alleged non-filings, and further stated that he could testify as to his observations of the defendant's behavior and state of mind at those times.

REASONS FOR GRANTING WRIT

In holding that it was within the discretion of the trial court to exclude testimony of the defense's first witness, even as "lay" or "percipient witness" testimony, the Court of Appeals overlooks petitioner's due process rights under the Sixth Amendment of the United States Constitution, and established law of a criminal defendant's right to present evidence in his defense. *Chambers v. Mississippi,* 410 U.S. 284 (1973); *Webb v. Texas,* 409 U.S. 95 (1972); *Washington v. Texas,* 388 U.S. 14 (1967).

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas, supra,* at page 19.
>
> "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi, supra,* at page 302.

Quite aside from the first expert's status as an expert, he was also a long-time friend and client of petitioner, who saw the petitioner frequently over a period of many years and was well acquainted with petitioner's behavior and attitudes toward himself and others. This included the period of time during which petitioner failed to file his tax returns, and any testimony in this respect would not have been based upon subsequent psychiatric examination of the petitioner, but upon actual observations of the witness. Although the trial court ruled that expert opinion testimony would not be permitted, nevertheless, this witness' eyewitness testimony of events and observations of the times in question should have been permitted before the jury. The trial court was in a position to make such protective orders as it deemed necessary to limit the scope of testimony and preclude any reference to it being "expert" opinion testimony. It would then be left to the jury to assess the veracity and credibility of this witness.

(Cf., Rule 701 of the Federal Rules of Evidence, "Opinion Testimony by Lay Witness." Also, *United States v. Pickett,* 470 F.2d 1255 (C.A.D.C. 1972), and *Smith v. United States,* 353 F.2d 838 (C.A.D.C., 1965), cert. den. *Cunningham v. United States,* 384 U.S. 910, and 384 U.S. 974.)

As this Court held in *Washington v. Texas, supra,* 388 U.S. at pages 21-22:

> "The federal courts followed the common-law restrictions for a time, despite the Sixth Amendment. In *United States v. Reid,* 12 How. 361

> (1852), the question was whether one of two defendants jointly indicted for murder on the high seas could call the other as a witness. Although this Court expressly recognized that the Sixth Amendment was designed to abolish some of the harsh rules of the common law, particularly including the refusal to allow the defendant in a serious criminal case to present witnesses in his defense [footnote omitted], it held that the rules of evidence in the federal courts were those in force in the various States at the time of the passage of the Judiciary Act of 1789, including the disqualification of defendants indicted together. The holding in *United States v. Reid* was not satisfactory to later generations, however, and in 1918 this Court expressly overruled it, refusing to be bound by 'the dead hand of the common-law rule of 1789,' and taking note of 'the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . .' *Rosen v. United States,* 245 U.S. 467, 471.
>
> "Although *Rosen v. United States* rested on nonconstitutional grounds, we believe that its reasoning was required by the Sixth Amendment. In light of the common-law history, and in view of the recognition in the *Reid* case that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a mat-

ter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief."

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EVERETT H. BERBERIAN,

Attorney for Petitioner.

April 13, 1978.

(Appendix Follows)

APPENDIX

In the United States Court of Appeals
for the Ninth Circuit

No. 77-2031

United States of America,
Plaintiff-Appellee,
vs.
Roy W. Hunt,
Defendant-Appellant.

[Filed Jan. 30, 1978]

Appeal from the United States District Court
for the Northern District of California

MEMORANDUM

Before: WRIGHT and ANDERSON, Circuit Judges, and WHELAN, District Judge.*

Appellant was convicted in a jury trial of willfully failing to file timely federal income tax returns for the calendar years 1970, 1971, and 1972, in violation of 26 U.S.C. § 7203.

Prior to trial, defendant and the government entered into a stipulation which, in effect, limited the

*Of the Central District of California.

issues before the trial court to whether defendant possessed the requisite *mens rea,* "willfulness," at the time of the offense.

Appellants first contends that the trial court erred in excluding expert psychiatric testimony offered (1) to establish the defense of diminished capacity, and (2) to establish his incapacity to form the requisite "willfulness."

We disagree. We have consistently and explicitly rejected diminished capacity as a defense to willful failure to file timely federal income tax returns. *United States v. Hawk,* 497 F.2d 365 (9th Cir. 1974); *United States v. Haseltine,* 419 F.2d 579 (9th Cir. 1969), *overruled on other grounds, United States v. Bishop,* 412 U.S. 346 (1973).

Further, we have given district courts wide latitude in accepting or rejecting psychiatric testimony offered to prove a defendant incapable of forming a specific intent that is an element of the crime charged. *United States v. Demma,* 523 F.2d 981 (9th Cir. *en banc* 1975). We will not upset a district court's exercise of discretion unless it was "manifestly erroneous." *Id.* at 987, *quoting United States v. Barnard,* 490 F.2d 907, 913 (9th Cir. 1973).

Although we are somewhat concerned that the district court chose to exclude all testimony relating to appellant's only defense, the exclusion of potentially confusing testimony is within the trial court's discretion under Fed. R. Evid. 403. We cannot conclude its exercise of discretion was "manifestly erroneous."

Appellant next argues the trial court erred in instructing the jury on the legal standard of "willfulness." In light of our decision in *United States v. Hawk,* 497 F.2d 365 (9th Cir. 1974) (cited with approval in *United States v. Pomponio,* 429 U.S. 10, 13 (1976)), we find this contention without merit.

Appellant finally contends that the trial court erred in admitting evidence of prior convictions and in refusing to admit certain lay testimony and evidence of a state conservatorship appointment. We find these contentions without merit. Decisions to admit evidence are singularly within the discretion of the trial judge, and we will not reverse absent an abuse of that discretion. We find none here.

The conviction is AFFIRMED. Appellant's enlargement on bail is revoked now.

United States District Court for
Northern District of California

Docket No. Cr 76-733-SC

United States of America,
vs.
Roy W. Hunt,
Defendant.

[Filed May 10, 1977]

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney
for the government the defendant Month Day Year
appeared in person on this date May 6 1977

Counsel

☐ Without Counsel However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ With Counsel Austin Stevens, Esq.
(Name of counsel)

Plea

☐ Guilty, and the court being satisfied that there is a factual basis for the plea,

☐ Nolo Contendere ☒ Not Guilty

Finding & Judgment

There being a verdict of ☐ Not Guilty, Defendant is ☒ Guilty discharged

Defendant has been convicted as charged of the offense(s) of willfully failing to make returns, in violation of Title 26, U.S.C., Section 7203, as charged in a three-count information.

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year and fined the sum of $10,000.00 (ten thousand dollars) as to Count 1; One (1) Year imprisonment, to run consecutively to the sentence imposed on Count 1, as to Count 2; One (1) Year imprisonment to run consecutively to the sentence imposed on Count 2, as to Count 3.

It is further Ordered any appearance bond filed herein is hereby exonerated.

It is further Ordered that a bond on appeal is set at $100,000.00 (one hundred thousand dollars).

Special Conditions of Probation

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by
☒ U.S. District Judge
☐ U.S. Magistrate /s/ Samuel Conti

Date 5-9-77

Entered in Criminal Docket May 10, 1977

In the United States Court of Appeals
for the Ninth Circuit

No. 77-2031

United States of America,
Plaintiff-Appellee,
vs.
Roy W. Hunt,
Defendant-Appellant.

[Filed March 17, 1978]

ORDER

Before: WRIGHT and ANDERSON, Circuit Judges, and WHELAN, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Anderson voted to reject the en banc suggestion.

The full court has been advised of the suggestion for a rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.